

## SERVICE INDUSTRIES

Service industries include establishments primarily engaged in providing a wide variety of services to individuals, businesses, government, and other organizations. The establishment may provide personal services (such as housekeeping, laundry, photography, and death services), business services (such as advertising, duplicating, janitorial, pest control, security, and telephone solicitation), repair services (such as auto, appliance, electronic equipment, watch/clock, and machinery repair), or a variety of other services.

### Who Is an Employee?

Section 621(b) of the California Unemployment Insurance Code (CUIC) defines an employee as:

“Any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee.”

A common law employee is an individual who is hired by an individual or entity (the *principal*) to perform services and the principal has the right to exercise control over the manner and means by which the individual performs his or her services. The right of control, whether or not exercised, is the most important factor in determining the relationship. The right to discharge a worker at will and without cause is strong evidence of the right of direction and control. Other factors to be taken into consideration are:

1. Whether or not the one performing the services is engaged in a separately established occupation or business.
2. The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of a principal without supervision.
3. The skill required in performing the services and accomplishing the desired result.
4. Whether the principal or the person providing the services supplies the instrumentalities, tools, and the place of work for the person doing the work.
5. The length of time for which the services are performed to determine whether the performance is an isolated event or continuous in nature.
6. The method of payment, whether by the time, a piece rate, or by the job.
7. Whether or not the work is part of the regular business of the principal, or whether the work is not within the regular business of the principal.

8. Whether or not the parties believe they are creating the relationship of employer and employee.
9. The extent of actual control exercised by the principal over the manner and means of performing the services.
10. Whether the principal is or is not engaged in a business enterprise or whether the services being performed are for the benefit or convenience of the principal as an individual.

In addition to the factors above, another consideration relative to employment is whether or not the worker can make business decisions that would enable him or her to earn a profit or incur a financial loss. Investment of the worker's time is not sufficient to show a risk of loss.

The above 10 factors are all considered in determining who is an employee, however, not all the factors need to be present to determine that a worker is an employee. If a sufficient grouping of favorable factors is present, the worker is a common law employee. In some cases, considerable freedom of activity is inherent in the nature of the work; however, this inherent freedom of activity does not in and of itself make the worker an independent contractor. The courts and the California Unemployment Insurance Appeals Board (CUIAB) have held that the fact that there is a contract specifying the relationship to be that of an independent contractor is not controlling. The courts have also held that the burden of proving that a worker is an independent contractor is on the employer.

Some examples of specific circumstances indicating employment that occur in the service industries include, but are not limited to, the following:

- The worker does not advertise or hold himself/herself out to the public as being self-employed.
- The worker is paid by the hour or by commission.
- The principal is responsible for any client problems or liability.
- The worker does not have a substantial investment in equipment or tools.
- The principal furnishes the place of work, equipment, supplies, parts, or tools.
- The worker is reimbursed by the principal for any expenses or supplies used in the performance of the services.
- The worker does not have a business license.
- The worker completes specific tasks assigned by the principal.
- The principal sets the rate of pay for services and is responsible for collecting the fees from the client.
- The worker has specified hours set by the principal to perform his/her services.

- The principal or the worker may terminate the relationship at any time without the worker incurring a liability for the work not completed.

### Examples of Employment in the Service Industries

(1) A janitorial business engages the services of janitors to clean homes, restaurants, offices, and buildings under the following circumstances:

- The janitorial business and the janitors signed written contracts identifying the janitors as independent contractors. The janitors were issued 1099s to report their earnings.
- The janitors were not directly supervised. However, they were provided with a list of general instructions.
- The janitors furnished their own vacuum cleaners and large equipment if needed.
- The janitors were unskilled.
- The janitors were not told specifically how to perform their services or when to work.
- The rate of pay was based on an hourly rate and days per month worked. How many days per month was mutually decided between the business and the janitors. Deductions were not taken from their pay.
- The janitors were assigned jobs by the business.
- Janitors could be removed from their assigned jobs if the work was unsatisfactory.
- The janitors were not bonded or required to carry insurance. They also did not have business licenses.
- The business was bonded and carried insurance for any possible liability. The business was licensed.

The janitors were common law employees of the business. The primary purpose of the business was to provide janitorial services and the janitors were an integral part of the business. The janitors were not engaged in their own businesses. The business retained the right of direction and control. The janitors were instructed on how to do their work and were subject to inspection. The janitors were not insured or bonded. The janitors were essentially paid hourly. The janitors performed services that are normally performed by employees (refer to CUIAB Tax Decision T-85-191).

(2) A business engaged the services of telephone solicitors for fund-raising and product sales under the following circumstances:

- The business usually provided the solicitors with a directory for calling individuals. The solicitors also obtained their own "leads."
- The business provided the solicitors with telephones, desks, and a work place.
- The solicitors were paid by commission.
- The business provided the solicitors with price lists and brochures.
- The solicitors performed their services during the business hours of 8:00 a.m. to midnight.
- The solicitors identified themselves as representing the business.

- Some of the solicitors performed similar services for other businesses.

The telephone solicitors were common law employees. The business provided the means to perform the work and had the right of direction and control over the services (refer to CUIAB Tax Decision T-86-64).

(3) A portrait photography studio engaged the services of a photographer under the following circumstances:

- The photographer was paid by commission. The studio set the rate of pay and paid the photographer weekly.
- The studio trained the photographer to perform services and furnished the equipment, supplies, and a place to work.
- The studio provided the clients and set the appointments.
- An agreement was signed which stated that the photographer would be responsible for his or her own taxes and would not work for a competitor or be a competitor for one year after termination.
- The relationship could be terminated at will by either the studio or the photographer without incurring liability to the photographer.

The photographer was a common law employee of the studio. The above factors are evidence of the right of direction and control (refer to CUIAB Tax Decisions T-86-149 and T-86-150).

(4) A business sells, installs, and repairs energy equipment. The workers performed repair services under the following circumstances:

- The business furnished hand tools and testing equipment.
- The workers were paid by the hour or by the job.
- The workers occasionally were instructed on how to perform their services.
- Some of the workers performed services for other companies.
- The business had the right to fire or discharge the workers at will without incurring financial liability to the worker.
- The workers were reimbursed for gasoline expenses.

The workers were common law employees. The above factors are evidence of the right of direction and control (refer to CUIAB Tax Decision T-85-3).

### Additional Information

For additional information regarding common law employment in the service industries, contact the nearest Employment Tax Office (listed in the *California Employer's Guide*, DE 44, and on our Internet site at [www.edd.ca.gov/taxrep/taxloc.htm#taxloc](http://www.edd.ca.gov/taxrep/taxloc.htm#taxloc)) or call us toll-free at 1-888-745-3886. Speech and hearing impaired persons can reach us at 1-800-547-9565.

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